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BEFORE THE DOCKET FILE COPY ORIGINAL  
**Federal Communications Commission**  
WASHINGTON, D.C.

NOV 22 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of ) MM Docket No. 93-94  
 )  
SCRIPPS HOWARD ) File No. BRCT-910603KX  
BROADCASTING COMPANY )  
et al. ) et al.  
 )  
For Channel 2 at Baltimore, Maryland )

To: The Honorable Richard L. Sippel  
Administrative Law Judge

**REQUEST FOR PERMISSION TO FILE APPEAL**

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Section 1.301(b) of the Commission's Rules, hereby requests permission to file an appeal of the Presiding Judge's Memorandum Opinion and Order, FCC 93M-708 (released November 16, 1993) ("MO&O") rejecting Four Jacks Exhibit 5.<sup>1/</sup> As shown below, the MO&O is seriously flawed, and this request plainly meets the criteria for grant of permission to file an appeal set forth in Section 1.301(b).

<sup>1/</sup> At the Admissions Session in this case, Scripps Howard Broadcasting Company ("Scripps Howard") moved into evidence Attachment R to Scripps Howard Ex. 3, consisting of letters of alleged "praise" received from the public by WMAR-TV during the period May 30-September 30, 1991 (the "License Term"). Four Jacks objected to the admission of these letters on the ground that letters received by WMAR-TV during the License Term "offering criticisms and complaints" (see Scripps Howard Ex. 3A at SH3-62) had not been offered into evidence. The Judge overruled Four Jacks' objection and received Attachment R. The Judge also stated, however, that Four Jacks had the right "to offer letters that [it] deem[s] to be negative," recognizing that with respect to letters from the public, "you want to see the good with the bad or the bad with the good." Tr. 319, 321. In response to the Judge's directive, Four Jacks exchanged its Exhibit 5, a compilation of over 80 letters of criticism and complaint from members of the public to WMAR-TV during the License Term -- only to have that exhibit rejected in its entirety in the Judge's MO&O.

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1. First, the MO&O's holding that the letters contained in Four Jacks Exhibit 5 "are either not negative and/or fail to relate to non-entertainment programming and/or do not occur within the renewal period" (MO&O, ¶ 5) is incorrect on all three counts. The Judge's view is that of the 42 letters he considered, "only seven letters are concerned with non-entertainment programming and each of those seven letters is complimentary to Scripps Howard's local non-entertainment programming (sports event preempted in favor of Children's Miracle Network Telethon)." Id., ¶ 2. However, even a cursory reading of these letters reveals that they are not "complimentary" to the Children's Miracle Network Telethon; to the contrary, the letters are highly critical of WMAR-TV's decision to preempt important NBA playoff games to air the telethon.

2. Moreover, it is simply not true that only these seven letters are "concerned with non-entertainment programming." As just a few examples, page 17 of Four Jacks Ex. 5 -- which the MO&O characterizes as merely concerning "C&P technical failures" -- is actually a letter sharply critical of WMAR-TV's news coverage of a serious areawide telephone network failure, characterizing that coverage as "superficial, slanted, and frankly, silly in content." In addition, page 48 of Ex. 5 is more than just a letter decrying the cancellation of the soap opera "Santa Barbara." That letter refers to a quote in a local newspaper attributed to then-WMAR-TV General Manager Arnold Kleiner concerning the Santa Barbara cancellation, and points out to Kleiner that "[y]our attitude in that interview is extremely poor for a general manager whose station depends on public opinion." These letters, like others in Four Jacks' exhibit, go beyond merely commentary on WMAR-TV's entertainment programming; they evidence the low view that at least some of the station's viewers held of WMAR-TV's public responsiveness.<sup>2/</sup>

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<sup>2/</sup> The Judge also erred in considering only those letters in Four Jacks Ex. 5 that were dated  
(continued...)

3. Putting all the above flaws aside, the MO&O committed an even more fundamental error by limiting consideration of adverse public letters to those which "establish WMAR-TV's reputation in the community for its non-entertainment programming," and holding that letters "concerned with cancellation of popular programming and similar dissatisfactions of viewers" are inadmissible. MO&O, ¶ 4.<sup>3/</sup> Thus, the Judge brushed aside precedent indicating that consideration of letters from the public is not so limited. For example, in Video 44, 3 FCC Rcd 3587, 3591 (Rev. Bd. 1988), rev. denied, 4 FCC Rcd 1209 (1989), remanded on other grounds sub nom. Monroe Communications Corp. v. FCC, 900 F.2d 351 (D.C. Cir. 1990), the Review Board noted that "[l]etters from Video 44's audience praising and criticizing the station's programs were also reviewed. Generally, many of these letters praised Video 44's older programs which had been replaced, and the violence and sexual orientation of some of the programs." (Emphasis added). Clearly, the letters from the

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2/(...continued)

during the "Renewal Period" (May 30-September 3, 1991). For example, a number of letters in the exhibit which are dated after September 3, 1991 complain of the discontinuation of Santa Barbara (and its replacement by the "Montel Williams Show") -- a program shift that took place during the Renewal Period. At page 103 of Ex. 5 appears a September 25, 1991 letter from two viewers which criticizes WMAR-TV's new expanded morning show -- an endeavor upon which Scripps Howard relies heavily. In short, in considering the letters contained in Four Jacks Ex. 5, the Judge should have focused not merely on the date of the letter, but on whether the matters giving rise to the letter occurred during the Renewal Period. Ironically and unfairly, the Judge has allowed Scripps Howard to introduce at least seven letters from the public dated after the Renewal Period. See Scripps Howard Ex. 3, Att. R, at SH3-0986, SH3-0994, SH3-0995, SH3-0998, SH3-1000, SH3-1001, SH3-1002.

3/ Not even Scripps Howard's own public letters meet this standard. A number of its letters relate not to non-entertainment programming on WMAR-TV, but merely to events which station personnel participated in or sponsored. See, e.g., Scripps Howard Ex. 3, Att. R, at SH3-0989, SH3-0996, SH3-0998, SH3-1001. One letter merely thanks the station's weatherman for changing the writer's tire. Id. at SH3-0990.

public admitted into evidence in Video 44 went beyond merely letters pertaining to the station's "reputation in the community for its non-entertainment programming."<sup>4/</sup>

4. The MO&O appears to rest on the Review Board's decision in Fox Television Stations, Inc., 8 FCC Rcd 2362 (Rev. Bd. 1993), but that case provides no support for the Judge's action here. The Board did not hold that evidence as to the station's release of a newscaster was irrelevant -- quite the contrary, it expressly remarked that "we ourselves might not have taken so restrictive a view of reputational evidence as to limit the testimony to only the responsive programming criterion." The Board held only that the Judge's preclusion of the evidence was harmless error. Id. at 2389 ¶ 36. Such is certainly not the case here, where the letters in Four Jacks Ex. 5 evince complaints about numerous programming decisions (including decisions relating to non-entertainment programming) and reflect the perceptions of a number of WMAR-TV viewers as to the station's public responsiveness.<sup>5/</sup>

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4/ Indeed, the programs whose cancellation was condemned by Video 44 viewers went far beyond non-entertainment programming. See Initial Decision, Video 44, 102 F.C.C.2d 419, 445 (ALJ 1985) (citing "700 Club" and other religious programs, "Sha Na Na," and "Leave It to Beaver"). The MO&O attempts to distinguish Video 44 on the basis that that case involved a major late-license term switch to subscription television. This is a distinction without a difference. The point is that the Video 44 decision represents a renewal case in which public comment on matters well beyond the station's reputation and non-entertainment programming were received into evidence and considered. Indeed, it is not apparent from the Video 44 decision that all of the negative viewer comments pertained to the licensee's switch to STV. The complaints considered by the ALJ and the Board spanned the station's entire three-year license term, while the wholesale shift to STV occurred only a few months prior to the end of the term. 3 FCC Rcd at 3587. The MO&O also ignored other comparative renewal cases in which viewer/listener complaints were received into evidence. See Seattle Public Schools, 4 FCC Rcd 625, 636 (Rev. Bd. 1989) (citing a number of cases in which complaint letters from the public were considered).

5/ Yet another reason for admitting Four Jacks Ex. 5 in its entirety is found in Scripps Howard Ex. 2, where Mr. Kleiner states that part of his "ascertainment" efforts consisted of reviewing "letters to the station from the public -- some of which forcefully challenged and criticized our programming priorities and decisions." Scripps Howard Ex. 2 at SH2-13.

5. For all these reasons, Four Jacks seeks permission to appeal the MO&O. This request meets the criteria for granting an interlocutory appeal set forth in Section 1.301(b) of the Rules. First, while the cases plainly suggest that all viewer complaints are relevant and admissible in a renewal proceeding, to undersigned counsel's knowledge neither the Board nor the Commission has ruled on the precise scope of adverse public letters that should be considered in such a proceeding. Thus, this appeal presents a "new or novel question" of law and policy.

6. Second, the error in the MO&O clearly "would be likely to require remand should the appeal be deferred and raised as an exception." In past renewal cases, the courts and the Commission have considered a lack of viewer/listener complaints as an important factor weighing in favor of a renewal expectancy. See, e.g., Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 508 (D.C. Cir. 1982); WPIX, Inc., 68 F.C.C.2d 381, 406 (1978). Were this appeal to be raised as an exception and granted by the Review Board, this case almost certainly would be remanded for the Judge to consider the fact of the more than 80 complaints contained in Four Jacks Ex. 5, and the bearing thereof on Scripps Howard's renewal expectancy claim.

For all the foregoing reasons, Four Jacks respectfully requests permission to file an immediate appeal of the MO&O.

Respectfully submitted,

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Dated: November 22, 1993

**CERTIFICATE OF SERVICE**

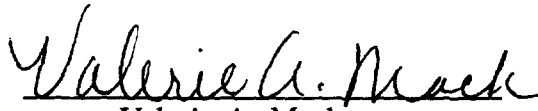
I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "**REQUEST FOR PERMISSION TO FILE APPEAL**" were sent this 22nd day of November, 1993, by first class United States mail, postage prepaid, to the following:

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